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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ADELE RABABY et al.,

Plaintiffs and Respondents,

v.

RANCHO SANTA FE ASSOCIATION,

Defendant and Appellant.

D054337

(Super. Ct. No. GIN048489)

APPEAL from a judgment of the Superior Court of San Diego County, Michael B. Orfield, Judge. Affirmed.

Adele and Tony Rababy own a triangular parcel of land in the commercial district of Rancho Santa Fe. The Rababys and their predecessors in interest have operated a gas station on the northern portion of the property since the mid-1960s. Uncertainty about classification of the parcel as residential or commercial under the Rancho Santa Fe Protective Covenant (Covenant) precipitated the current litigation. Following the first stage of a bifurcated court trial on the cause of action for declaratory relief, the court

ruled that the Rancho Santa Fe Association (Association) could not enforce the residential restriction.

The Association appeals, arguing that the court "fundamentally misapplied" the standard for enforcement of equitable servitudes under *Nahrstedt v. Lakeside Village Condominium Assn., Inc.* (1994) 8 Cal.4th 361 (*Nahrstedt*), and there are no other grounds on which to affirm the judgment. The Association also contends the court erred in denying its request for leave to amend its answer at the close of evidence. We conclude the court acted within its equitable and statutory powers in refusing to enforce the residential use restriction in the circumstances of this case and acted within its discretion in denying leave to amend the answer. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The subject property is currently located within the Association and subject to the Covenant. This was not always the case. The area that came to be known as Rancho Santa Fe was subdivided and some parcels, including the subject property, were sold before the Association was formed and the Covenant recorded. Paragraph 171 of the Covenant sets forth the annexation procedure. It provides that a property owner may accept the Covenant to become a member of the Association, thereby giving the Rancho Santa Fe Art Jury (Art Jury) and the Association jurisdiction over the property. Properties left out of the Covenant could become part of the Association through annexation.

The Santa Fe Land Improvement Company conveyed the subject property to E. D. and Ethel Williams in November 1927, and no portion of it was owned by a signatory to

the Covenant at the time the Covenant was executed and recorded in February 1928. Nonetheless, paragraph 193 of the Covenant designated use of the northern portion of the subject property as Class G. That designation includes businesses listed in Class F - general businesses, garages and dwellings - plus material and wholesale businesses, but prohibits residential use. There is no evidence to explain this reference to the subject property in the Covenant.

The subject property became part of the Association and subject to the Covenant pursuant to a document titled "ACCEPTANCE OF RANCHO SANTA FE COVENANT" (Acceptance) which E. D. and Ethel Williams, the Association, and the Art Jury executed in August 1928. The board of directors of the Association (Board) approved the Acceptance the following week. The Acceptance "purports" to designate use of the subject property as Class A which is limited to detached single family dwellings.

A gas station has operated on the subject property since 1966 with the approval of the Art Jury. There is no evidence to explain why the Art Jury approved this change in property use. The Rababys purchased parcels A and B, which comprise the subject property, from different persons in the early 1980's, and have continued to operate the gas station on the northern portion up to the present time. However, Adele Rababy testified that Mobil Oil cancelled their franchise in September 2006 because they were not selling enough gas. An historic Lilian Rice residence was situated on the southern portion of the property which housed a dressmaker, then one of the Rababys' sons. The Rababys also used the southern portion of the subject property as an extension of the gas station to

store parked cars and recently removed the old house. Exhibit 9, an exhibit to the Rancho Santa Fe regulatory code drafted in the 1990's, shows the subject property within the boundaries of Rancho Santa Fe's commercial district. The map does not designate the subject property as residential.

Paragraph 165 of the Covenant sets forth the procedure to modify restrictions. Pursuant to this paragraph, the Rababys submitted three requests for covenant modification to change the use of the entire parcel from Class A (residential) to Class F (business). The Association denied the Rababys' request for an extension of time to revise their first application, made in 1981, and they did not pursue the matter further. In 1988, the Board approved the Rababys' second application for a covenant modification, but the Association's membership overturned the Board's approval. The Rababys' submitted a third application in 2003 which the Board approved on April 1, 2004, with the following conditions and restrictions:

"(a) [The Rababys] were required to subdivide the Subject Property into two parcels under the Covenant.

"(b) The Northern Parcel (where the gas station is located) was changed to a restricted form of Class F, with the only permitted uses being (i) the existing gas station, and (ii) retail uses permitted under Class F, prohibiting office uses and residential uses.

"(c) The Southern Parcel where the Lilian Rice residence was then located, was changed to a restricted form of Class D, with the only permitted uses being (i) retail uses permitted under Class D, (ii) residential uses permitted under Class A, and prohibiting any office use as well as any uses otherwise permitted by Classes B and C. Additionally, in the event the Lilian Rice residence was demolished and not reconstructed, the Southern Parcel would revert to Class A."

The Rababys did not perfect the 2004 covenant modification approved by the Board and it expired on May 5, 2005. Adele Rababy testified that after looking over the Board's conditional approval "again and again . . . there was just so many restrictions and conditions, and [she] just felt that [she] just couldn't . . . shouldn't sign it."

The Rababys filed their complaint for breach of covenant, breach of fiduciary duty, violation of Civil Code section 1366.1 (all undesignated statutory references are to the Civil code), and for injunctive and declaratory relief in November 2005. The parties filed cross-motions for summary judgment and summary adjudication on the applicability of paragraph 193 of the Covenant, which designated the subject property as a Class G use, and the validity of the Acceptance, which designated the subject property as a Class A use. The court denied both motions, and the case proceeded to bifurcated trial.

After considering objections to its tentative decision, the court issued a final decision in which it found:

(1) Paragraph 193 of the Covenant "has no legal effect on the subject property, and this Court declares it null and void as of its date of creation insofar as it relates to the subject property."

(2) When the subject property "was absorbed into the covenant per Exhibit 10 [the Acceptance], it became an annexed property, with Class A designation. . . . [T]hat was clearly the intent of all parties involved in the covenant and the acceptance."

(3) Exhibit 10 created an equitable servitude and a quasi-zoning classification for the subject property.

(4) The fact that the Art Jury's decision to allow use of a gas station on Class A property "went uncontested by the defendant for 40 years is clear evidence that the defendant acquiesced in this decision, never challenging its reasonableness, the parcel being in the middle of Rancho Santa Fe."

(5) Given the location of the subject property "right in the middle of the commercial district of Rancho Santa Fe," the restriction of the subject property to use as a Class A or residential property is "patently unreasonable" and in direct conflict with "the protection, preservation, operation, or purpose of the land governed by the [Covenant]."

(6) "[E]nforcement of this equitable servitude imposes a disproportionate burden on the affected land that greatly outweighs any beneficial effect."

(7) "Absent the classification of the property as Class A in the Acceptance, the property defaults to the classifications found in the Protective Covenant" and because the Covenant was recorded, "there is a presumption of reasonableness that attaches to such documents."

(8) "[U]se of the property as either a Class F or a Class G, is presumed reasonable and would in fact be reasonable. No enforcement as a Class A property is therefore allowed."

The Rababys voluntarily dismissed their causes of action for breach of covenant, breach of fiduciary duty, and violation of section 1366.1, and the court entered judgment on the causes of action for declaratory and injunctive relief. This appeal ensued.

DISCUSSION

I. *Equitable Servitudes*

The principal issue in this appeal is whether the court erred in ruling the Covenant's Class A restriction unenforceable as an equitable servitude. "Whether a determination is proper in an action for declaratory relief is a matter within the trial court's discretion and the court's decision to grant or deny relief will not be disturbed on appeal unless it is clearly shown its discretion was abused. [Citation.]" (*Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974 (*Dolan-King*)). Where, as here, the underlying facts are undisputed, "we are confronted with questions of law. [Citations.]" (*Ibid.*) "[T]o the extent our review of the court's declaratory judgment involves an interpretation of the Covenant's provisions, that too is a question of law we address de novo. [Citations.]" (*Ibid.*)

We affirm the judgment of the trial court, not the rationale. Thus, if the result below is correct on any theory, we will affirm, "regardless of the considerations which may have moved the trial court to its conclusion." (*D'Amico v. Bd. of Medical Examiners* (1974) 11 Cal.3d 1, 18-19 (*D'Amico*), quoting *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

The Association argues that the court erred in applying the standards for enforcement of equitable servitudes by failing to focus on the effect of the Class A designation on the community as a whole and failing to accord it a "strong presumption of reasonableness." As we explain, there is no merit in the Association's arguments.

The Davis-Stirling Common Interest Development Act (§ 1350 et seq.), provides that the covenants and restrictions contained in the declaration recorded by the association managing a common interest development "shall be enforceable equitable servitudes, *unless unreasonable*, and shall inure to the benefit of and bind all owners of separate interests in the development." (§§ 1351, subd. (a), 1353, 1354, subd. (a), italics added.) The language of section 1354 "cloak[s] use restrictions contained in a condominium development's recorded declaration with a presumption of reasonableness by shifting the burden of proving otherwise to the party challenging the use restriction." (*Nahrstedt, supra*, 8 Cal.4th at p. 380.) Although Rancho Santa Fe is an ordinary subdivision and not a common interest development as defined in section 1351, the court properly found that use restriction set forth in the Acceptance created an equitable servitude. (*Nahrstedt, supra*, 8 Cal.4th at p. 375.) This court previously applied section 1354 to Rancho Santa Fe's Covenant. (See *Dolan-King, supra*, 81 Cal.App.4th at p. 975.)

When, as here, a restriction is contained in the Covenant "and is recorded with the county recorder, the restriction is presumed to be reasonable and will be enforced uniformly against all residents of the common interest development *unless* the restriction is arbitrary, imposes burdens on the use of lands it affects that substantially outweigh the restriction's benefits to the development's residents, or violates a fundamental public policy." (*Nahrstedt, supra*, 8 Cal.4th at p. 386, italics in original.) Under section 1354, "the reasonableness or unreasonableness of a . . . use restriction . . . is to be determined *not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt, supra*, 8 Cal.4th at p. 386.)

However, common law defenses still apply and courts deny enforcement of land use restrictions as inequitable "when a change in surrounding properties effectively defeats the intended purpose of the restriction, rendering it of little benefit to the remaining property owners." (*Id.* at p. 381; 8 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 24.31, pp. 24-109.) We conclude that the court correctly applied the standards set forth in section 1354, *Nahrstedt*, and the common law to determine that changed circumstances rendered the Class A classification inequitable, unreasonable, and therefore unenforceable.

We begin by rejecting the Association's argument that the Rababys offered no evidence of the historical use of the property and ignored the restriction's effect on the project as a whole. The Covenant itself designated all property Class A residential use "except as otherwise provided." This residual restriction to residential use was consistent with various statements of purpose included in the Covenant's preamble. The preamble also made clear that the signatories intended to establish and maintain a community plan. The preamble read, in part: (1) "Rancho Santa Fe is unusually attractive and valuable as a high class place of residence because of the rare quality of its landscape, trees and shrubs and the fine architecture and other improvements established by its property owners"; (2) "[T]hese property owners are most desirous of preserving, continuing and maintaining this character of community and rare landscape features and of upholding the quality of all future architecture and improvements; *and of restricting the use, height and bulk of buildings*"; and (3) "That said undersigned property owners hereby certify and declare that they *have established and do hereby establish the general and local plan for*

the protection, maintenance, development and improvement of the property now or hereafter made subject to the conditions hereof . . . all of which is and are for the benefit of all said property and of each owner of land therein and shall inure to and pass with said property and each and every parcel of land therein" (Italics added.)

The record reveals that in the mid-1960's there was a change in use of a portion of the subject property. We assume the owners of the subject property at that time worked under the assumption that their property was Class A residential. Otherwise it would have been unnecessary for the Art Jury to approve operation of a gas station, a Class F use. The remainder of the property continued to be used for residential purposes after the gas station began operations.

The record also reveals that by the 1990's the Association viewed the subject property as nonresidential and within the boundaries of the Rancho Santa Fe commercial district. The Exhibit 9 map of the commercial district attached to chapter 47 of the Rancho Santa Fe regulatory code, which included regulations pertaining to commercial district design and development, did not identify the subject property as residential. Moreover, the neighboring properties were nonresidential. The maps shows that the six residential properties in the commercial district were more than a block away from the subject property and faced a different street.

The next question is whether these changed circumstances defeated the intended purpose of the restriction and rendered it of little benefit to the remaining property owners. (*Nahrstedt, supra*, 8 Cal.4th at p. 381.) Exhibit 9 clearly supports an affirmative answer to both questions. If the intent of the Class A use was to maintain the residential character of

the part of Rancho Santa Fe where the subject property was located, the court could reasonably conclude that purpose was defeated once commercial properties surrounded it. The court could also reasonably conclude that owners of those commercial properties would receive little benefit from the subject property's continued official designation as Class A residential. Moreover, if surrounding commercial property owners were looking for stability in the character of the district, the Association's promise to permit continued limited commercial use of the subject property as a gas station would be of little comfort to them in light of Adele Rababy's testimony suggesting that the economic viability of the business was in question.

As we explained, the question whether it was inequitable and unreasonable to enforce the Class A designation in the circumstances of this case is a matter left to the trial court's discretion. (*Dolan-King, supra*, 81 Cal.App.4th at p. 974.) The record supports the court's finding that enforcement of the equitable servitude imposed "a disproportionate burden on the affected land that greatly outweigh[ed] any beneficial effect." Indeed, it is difficult to identify any beneficial effect on this record. The Art Jury's 1965 approval and the Association's continued acquiescence in the gas station use without a formal covenant modification simply muddied the waters. We conclude there was no abuse of discretion in declaring Class A use unenforceable. Given this conclusion, we need not address other possible grounds cited by the Rababys for affirming the judgment. (*D'Amico, supra*, 11 Cal.3d at pp. 18-19.)

II. *Request for Leave to Amend the Answer*

The Association also contends that the trial court erred in denying its request for leave to amend its answer. Although California courts have a "policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding," the question whether to grant leave to amend in a particular case remains within the trial court's discretion. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) The burden is on the moving party to demonstrate an abuse of discretion. (*Ibid.*) We conclude the Association failed to sustain its burden of showing that the court abused its discretion in denying leave to amend in the circumstances of this case.

At the close of evidence, the Association requested leave to amend its answer to add a statute of limitations defense "to conform to proof." It had argued in its opening statement that the Rababys' claim was "hopelessly time barred" because they knew in 1981 that the subject property was designated Class A but waited until 2005 to raise the fact it had been classified as Class G by paragraph 193 of the Covenant. The Association contended that the Rababys would suffer no prejudice from the timing of the requested amendment because the parties had addressed the issue in an earlier motion for summary judgment.

The court denied the request as untimely and unfair to the Rababys. It observed that "an affirmative defense that by its definition wipes out a cause of action is not something that can easily be added." The court also suggested that its ruling might have been different if the Association had moved to amend at the start of trial so that the

Rababys' counsel "could at least have a heads-up as to what information he need[ed] to put on in his case . . . to counter the affirmative defense."

We agree with the court's assessment that the addition of the statute of limitations defense would have prejudiced the Rababys at that late stage in the proceedings. As the court noted, "There's a lot of law surrounding the statute of limitations." Counsel for the Rababys maintained that they relied on the state of the pleadings at the start of trial and would have done additional research on the statute of limitations had it been included in the answer. Moreover, the Association clearly had the issue in mind at the start of trial - it was not a question that surfaced during the examination of witnesses at trial. The Association offered no excuse - let alone a reasonable excuse - for its delay in attempting to add the statute of limitations defense.

DISPOSITION

The judgment is affirmed. The Rababys are awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

McINTYRE, J.

WE CONCUR:

McDONALD, Acting P. J.

AARON, J.